



THE SUPREME COURT OF KENYA

STANBIC BANK KENYA LTD V. SANTOWELS LIMITED

SC PETITION NO. E005 of 2023

DATE OF JUDGMENT: 28TH JUNE, 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court dismissed the appellant’s appeal and the respondent’s cross Appeal, and issued the following declaration:

“A declaration do hereby issue that interest rates on loans and facilities advanced by banks/financial institutions are subject to the regulatory process under Section 44 of the Banking Act. In that, such banks/financial institutions are required to seek the approval of the Cabinet Secretary responsible for matters relating to Finance prior to increasing interest rates on loans and facilities advanced.”

Background

On the premise of a banker/customer relationship, Stanbic Bank Kenya Limited (the appellant) advanced loan/overdraft facilities to Santowels Limited (the respondent) between 1993 and 1997. Some of the pertinent terms of the facilities advanced were that they could be renewed and/or extended, the rate of interest was 3% per annum above the appellant’s base lending rate, and the appellant reserved the right to vary the rate of interest. However, a dispute arose between the parties with respect to the interest rates applied to the facilities from the onset up until the payment in full. The main issue of contention was whether the interest rates were subject to regulation under the Central Bank of Kenya and the Banking Acts or were entirely subject to the terms of the parties’ contract. Both the High Court and Court of Appeal found that the appellant was required to seek the approval of the Cabinet Secretary responsible for matters relating to Finance before increasing the rate of interest as stipulated under Section 44 of the Banking Act.

Dissatisfied with the Court of Appeal’s decision, the appellant sought certification or leave of the said court to file its intended appeal, which it contended raised issues of general public importance envisaged under Article 163(4)(b) of the Constitution, before the Supreme Court. By a ruling dated 17th February 2023, the Court of Appeal issued the certification sought and the appellant filed this appeal. The matters of general public importance, revolved around the interpretation of Sections 44 and 52 of the Banking Act. More particularly, whether banks and financial institutions are required to seek approval of the Cabinet Secretary responsible for matters relating to Finance envisaged under Section 44 of the Banking Act prior to increasing rates of interest on loans and/or facilities advanced to their customers. Concomitantly, whether interest rates are liberalised, and are simply a contractual matter subject to mutual negotiation by the banks/financial institutions and their customers by virtue of Section 52 of the Banking Act. In addition, the respondent filed

a cross appeal challenging the amount that was awarded to it by the Court of Appeal as the overcharged interest.

The following issues arose for consideration by the Supreme Court:

- i. *Whether the appellant's appeal raised issues of general public importance.*
- ii. *Whether the respondent's cross appeal was properly before the Supreme Court.*
- iii. *Whether the appellant's appeal went beyond the scope of the certification by the Court of Appeal.*
- iv. *What is the correct interpretation of Sections 44 and 52 of the Banking Act?*
- v. *What orders should issue?*

Upon consideration, the Supreme Court dismissed the appellant's appeal and the respondent's cross appeal for the reasons that:

1. **Issue 1:** The procedure and timeline for seeking review by the Supreme Court of certification of an intended appeal as raising issue(s) of general public importance or the decision declining such certification by the Court of Appeal is aptly set out in Rule 33(2) and (3) of the Supreme Court Rules, 2020. In particular, such review should be sought before the Supreme Court within 14 days of the Court of Appeal's decision on certification through an Originating Motion. Therefore, by the time the respondent raised its objection at the hearing of the appeal before the Supreme Court, the prescribed timeline for seeking review of the certification had long passed.
2. **Issue 2:** The respondent's cross appeal should have been brought within the realm of the appellant's appeal, which was filed following certification under Article 163(4)(b) of the Constitution. Therefore, the respondent should have sought certification of the issues raised in its cross appeal prior to lodging the same. Consequently, the respondent's cross appeal is defective.
3. **Issue 3:** The Court of Appeal should have specifically formulated or delineated the issue(s) it deemed is/are of general public importance, and warrant consideration by the Supreme Court. This is because such formulation would have not only guided litigants from going off on a tangent but will act as an indicator of whether an appeal lodged pursuant to certification under Article 163(4)(b) exceeds the parameters pursuant to which it was admitted. Nonetheless, the Supreme Court delineated that the issue of general public importance in the appeal was the proper interpretation of Sections 44 and 52 of the Banking Act. Any other issue and the invitation by the appellant to the Supreme Court to reconsider issues of facts were beyond the scope of certification by the Court of Appeal.
4. **Issue 4:**
 - i. The phrase "*rate of banking*" employed or used in Section 44 of the Banking Act relates to charges for the banking business/service offered by a bank/financial institution, which includes the advancement of loans/facilities. Therefore, the interpretation of Section 44 which reads, "***No institution shall increase its rate of banking or other charges except with the prior approval of the Minister***" is that a bank/financial institution is required to seek approval of the Cabinet Secretary responsible for matters relating to Finance prior to increasing the interest rates on loans/facilities advanced to its customers.
 - ii. The Court's interpretation of Section 44 of the Banking Act neither contradicts Section 52 of the Banking Act nor prohibits banks/financial institutions and their customers to bargain and enter into a mutual contract with respect to interest rates that will be applied to loan facilities. However, interest rates on loans/facilities are subject to the regulation under Section 44 of the Banking Act. This means that

while a contract that is mutually agreed by parties might provide the bank with the discretion to alter/vary interest rates on loans, that discretion is not absolute/unlimited.

Accordingly, the Court issued the following orders:

- a) A declaration do hereby issue that interest rates on loans and facilities advanced by banks/financial institutions are subject to the regulatory process under Section 44 of the Banking Act. In that, such banks/financial institutions are required to seek the approval of the Cabinet Secretary responsible for matters relating to Finance prior to increasing interest rates on loans and facilities advanced.***
 - b) The appellant's appeal dated 1st March, 2023 and filed on 2nd March, 2023 is hereby dismissed.***
 - c) The respondent's cross appeal dated 22nd March, 2023 and filed on 31st March, 2023 is hereby dismissed.***
 - d) Each party will bear their own costs of the appeal and cross appeal before this Court.***
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